STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 3, 2003
v	No. 241367 Delta County Circuit
TODD STEPHEN WILLIAMS, Defendant-Appellant.	LC No. 01-006782-FH

Before: Smolenski, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

Defendant was charged with two counts of uttering and publishing, MCL 750.249. Following a jury trial, defendant was convicted of one count of uttering and publishing that related to a check taken from Dennis Ernest, and sentenced as a fourth habitual offender, MCL 769.12, to 30 months' to 20 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in not permitting defendant to impeach witness Christopher Berg with a prior conviction for passing a bad check. Because defendant failed to specify under which rule of evidence he sought to impeach Berg, we review this issue for plain error only affecting defendant's substantial rights. *People v Carines*, 460 Mich 750; 763; 597 NW2d 130 (1999). Defendant also argues that the trial court erred in ruling that the evidence was inadmissible under MRE 404(b) to show motive, plan or scheme. The decision whether to admit evidence lies within the trial court's sound discretion and will not be disturbed absent an abuse of that discretionary authority. *People v Martzke (On Remand)*, 251 Mich App 282, 286; 651 NW2d 490 (2002).

MRE 609 provides that a witness' credibility may be attacked by evidence of a conviction under certain circumstances. Outside the presence of the jury, Christopher Berg admitted that he pleaded guilty in Missouri to a charge of passing a bad check, and received a suspended sentence. The trial court ruled that because Missouri did not consider successful completion of a suspended sentence to be a conviction, it could not be used to impeach the witness.

Assuming, without deciding, that the trial court was correct in not admitting the evidence under MRE 609,[1] it was within the trial court's discretion to admit the evidence under MRE 608. Specifically, MRE 608(b) provides, in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, …

The Missouri charge and Berg's subsequent guilty plea to passing a bad check was certainly probative of the witness' character for truthfulness, and defendant should have been allowed to inquire into the incident on cross-examination. However, we find this error harmless.

Berg's testimony consisted of a general denial of any involvement in the taking or cashing of the Ernest and Hietala checks. Even had the jury disbelieved Berg's testimony and his credibility impeached, there was still sufficient evidence from which the jury could conclude that defendant was guilty of uttering and publishing the Ernest check on an aiding and abetting theory. Defendant admitted to the police that Berg had come to his house with some stolen checks and told defendant he could buy merchandise with the money. Defendant further admitted to the police that he went with Berg to Shopko and chose the coat rack. A cashier at Shopko testified that the Ernest check was used to purchase a television and a coat rack, and a stock person at Shopko who knew defendant testified that he loaded the coat rack into defendant's car. Finally, defendant's girlfriend testified that defendant brought the coat rack home and assembled it.

In regards to defendant's contention that evidence of Berg's Missouri "conviction" was admissible under MRE 404(b). We disagree. Evidence of other crimes is inadmissible to prove that a person acted in conformity with a particular character trait; however, it is admissible for other purposes. MRE 404(b)(1). Defendant asserted at trial that the incident was admissible to show Berg's motive, plan or scheme. Defendant presented no argument at trial or on appeal as to how the Missouri incident, a charge that stemmed from writing a check on non-sufficient funds, established a motive to steal checks and forge signatures in this case, nor can we surmise one.

In order to support an inference that the charged act is part of a common plan, scheme, or system, there must be such a concurrence of common features between the charged acts and other wrongful acts that the various acts are naturally to be explained as caused by a general plan. *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000). Defendant presents no argument as to why the evidence demonstrates a plan, scheme, or system. The only similarity

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[1] While defendant did not specify which rule of evidence under which it sought to admit the evidence, it is apparent from the trial court's ruling that it considered the request under MRE 609, which deals with impeachment of a witness by a prior conviction.

we observe is that both acts involved a check. We find this insufficient to support an inference that the charged crime was part of a common scheme or plan by Berg.

Next, defendant argues that the trial court erred in failing to sua sponte instruct the jury on "mere presence," CJI 8.5, and give a special cautionary instruction on the inherent reliability of accomplice testimony, CJI 5.4-5.6. Again, we disagree.

The trial court was under no obligation, absent a request, to instruct the jury on a particular point of law. *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999). Furthermore, while there was evidence that Berg was an accomplice, the trial court's failure to sua sponte provide a cautionary instruction constitutes reversible error only if the defendant's guilt is closely drawn. *People v Reed*, 453 Mich 685, 692-693; 556 NW2d 858 (1996). A defendant's guilt is considered closely drawn "if the trial is essentially a credibility contest between the defendant and the accomplice." *People v Jensen*, 162 Mich App 171, 188; 412 NW2d 681 (1987). A "credibility contest" exists in this context where, absent the accomplice's testimony, a rational trier of fact could not conclude beyond a reasonable doubt that the defendant committed the offense. See *People v Perry*, 218 Mich App 520, 530; 554 NW2d 362 (1996).

The crime of uttering and publishing is established by proof that (1) defendant knew that the instrument was false, (2) defendant had an intent to defraud, and (3) defendant presented the instrument for payment. *People v Dukes*, 189 Mich App 262, 265; 471 NW2d 651 (1991). In order to be convicted for aiding and abetting in the commission of a specific intent crime, the aider and abettor must have had either the specific intent required of a principal of the crime or the knowledge that a principal has such intent. *People v King*, 210 Mich App 425, 431; 534 NW2d 534 (1995).

In this case, Berg's testimony consisted of a general denial of any involvement. Thus, even without Berg's testimony, for the reasons stated above in our harmless error analysis, the jury could have concluded beyond a reasonable doubt that defendant was guilty of uttering and publishing, at least on an aiding and abetting theory. Hence, there was no error requiring reversal. Accordingly, it is not necessary to address defendant's ineffective assistance of trial counsel argument regarding this issue.

Defendant also argues that the trial court erred in refusing to allow a member of defendant's family to speak on his behalf at the sentencing hearing, presumably to inform the trial court of defendant's alleged dramatic personal positive transformation since his last release from prison. Defendant asserts that this denied him his right to allocution. In determining whether a defendant was denied his right of allocution, an appellate court reviews the sentencing transcript de novo. *Brandt v Brandt*, 250 Mich App 68, 75; 645 NW2d 327 (2002).

At sentencing, the court must on the record give the defendant, the defendant's lawyer, the prosecutor and the victim an opportunity to advise the court of any circumstances which they believe the court should consider in imposing sentence. MCL 6.425(D)(2)(c). No other party has a right to be heard at sentencing, although it is within the court's discretion to allow other persons to speak. See *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994); *People v Lawson*, 172 Mich App 498, 500-501; 432 NW2d 354 (1988). While it appears that the trial court did not recognize its discretionary power in this regard, we find no error requiring

resentencing given that defendant's lawyer and defendant himself did choose to speak to the court directly and addressed defendant's transformation. Therefore, we find that defendant was not denied his right to allocution.

Lastly, defendant argues that he was denied the right to a unanimous jury verdict where it appeared that one of the jurors actually voted to acquit defendant of both charges, and the trial court refused to question the juror. Defendant claimed that one of the jurors, a family member's friend, told his brother-in-law that he voted to acquit defendant on both counts, but the rest of the jury would not accept his vote. At trial both parties declined the court's invitation to poll the jury, and no juror directly informed the court that those verdicts were not his own. Furthermore, the trial court did not foreclose the possibility of questioning the juror as to his votes, but rather told defendant that it must provide the court with a legal basis for doing so before oral testimony would be taken from the juror. Defendant did not pursue the issue, filing no post-verdict motions or briefs. Accordingly, defendant waived review of this issue and is not entitled to relief on this basis.

Affirmed

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell